In the

Supreme Court of the United States

October Term, [redacted] 1975

No. [redacted] 84

THOMAS W. MILLER, Acting Receiver, Overseas and
MUNICH REINSURANCE COMPANY,
Appellants,

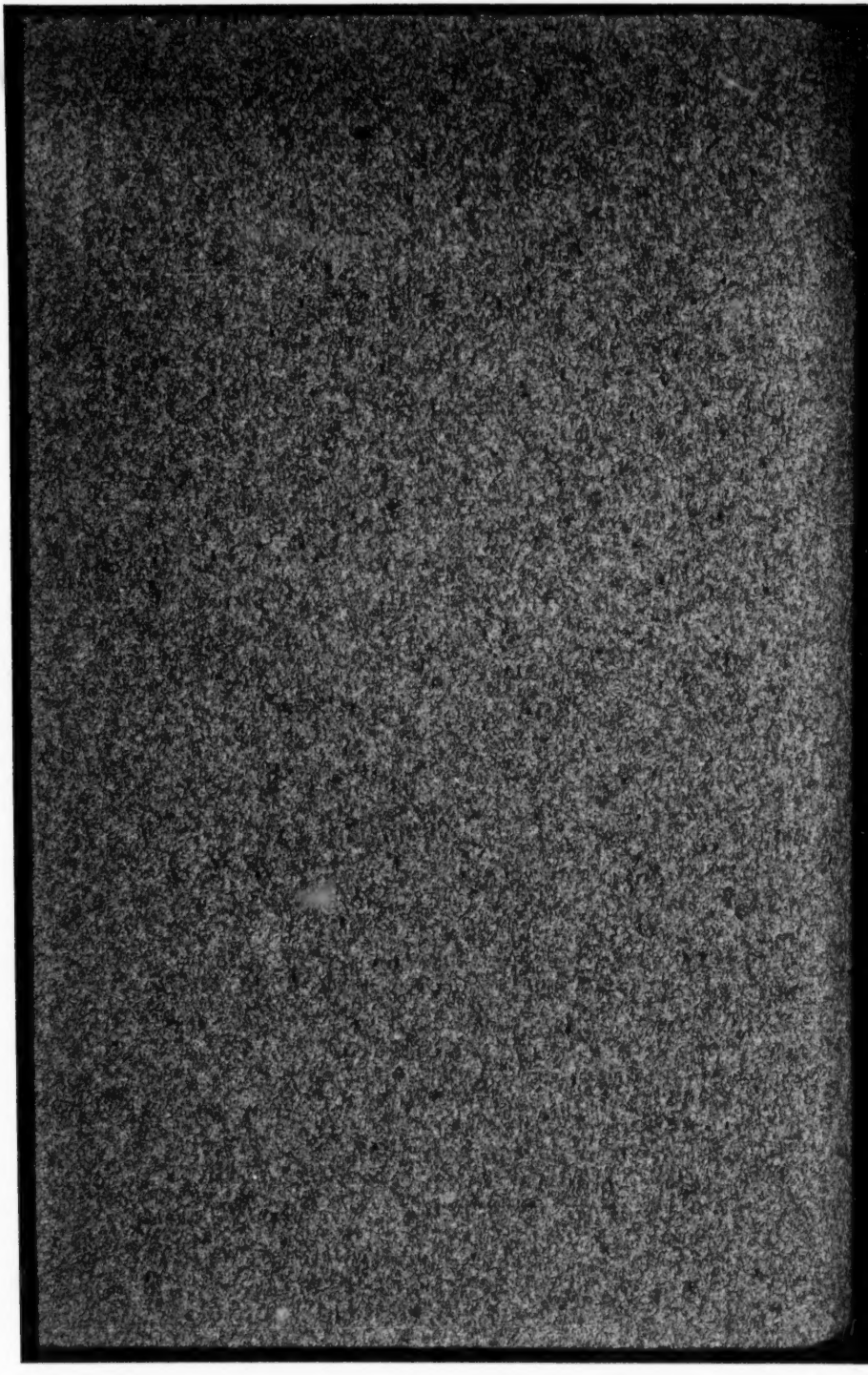
vs.

ERWIN W. POE, STUART S. JANNEY, ERNEST J.
OLSEN and G. KEMP BARTLETT, Executors of
the Estate of Ernest Janney, Deceased,
Appellees.

BRIEF FOR APPELLEES.

JOSEPH C. FRANCE,
G. KEMP BARTLETT,
STUART S. JANNEY,
Solicitors for Appellees.

Of counsel:
BARTLETT, POE & SHAGGETY,
JANNEY, OBER, SHINGLUFF & WILLIAMS.



INDEX.

	PAGE.
OUTLINE OF FACTS	2
THE CONCLUSIONS OF THE COURT BELOW	8
THE MUNICH'S FIRST CONTENTION	9
THE MUNICH'S SECOND CONTENTION	13
THE MUNICH'S THIRD CONTENTION	16

TABLE OF CASES.

Allemania Fire Insurance Company v. Firemen's Insurance Company, 209 U. S. 326	14, 15
Barber Asphalt Company v. Poe, et al., 139 Md. 339	13
Central Trust Company v. Chicago Auditorium, 240 U. S. 581	9
Consolidated Real Estate Company v. John Cashow, 41 Md. 59	14
Munich Company v. United Surety Co., 113 Md. 200	4, 5
Munich Company v. United Surety Co., 121 Md. 479	5, 10, 17, 18
Munich Company v. Poe, et al., 126 Md. 520	6, 10

In The

Supreme Court of the United States.

October Term, 1924.

No. 289.

THOMAS W. MILLER, Alien Property Custodian and MUNICH REINSURANCE COMPANY
Appellants

vs.

EDWIN W. POE, STUART S. JANNEY, ERNEST J. CLARK and J. KEMP BARTLETT Receivers of the United Surety Company
Appellees.

BRIEF FOR APPELLEES.

This appeal is from a decree of the Circuit Court of Appeals for the Fourth Circuit affirming a decree of the Maryland District Court in Equity, directing the Alien Property Custodian to pay to the Appellees the sum of $189,517.16 with interest, out of the assets of the Munich Re-Insurance Company,—a German corporation. The Appellees are the receivers of a Maryland corporation, namely: the

United Surety Company; and the suit was brought under Section 9 of the Trading with the Enemy Act, for the final accounting under the Contract between the two Companies,—hereinafter discussed. In the language of Judge Rose, then District Judge (R. 166): "The principal defendant is the Munich Re-Insurance Company, a corporation of Bavaria. The Alien Property Custodian, who holds its American property does not raise any defense peculiar to himself, and may in this discussion be ignored."

OUTLINE OF FACTS.

First: The litigants will be called, for short, the "United" and the "Munich." Their connection began in 1906 with the birth of the United; and is evidenced by the Contract set forth on pages 14-20 of the Record,—which is the basis of this suit. There was much instructive discourse below by the Munich's learned counsel, touching the legal differences between this Contract and the conventional treaty of re-insurance; and these differences seemed to shift with the exigencies of the defense. But, it is respectfully submitted, the decision in this case does not depend upon names. Essentially, the Munich, in consideration of one-third of the profits, agreed to assume and pay to the United, one-third of the losses arising from all business of certain kinds (Fidelity, Surety and Burglary) which should be written by the new Company. As to this business, there was a *quasi* partnership with the United as managing partner; and at the same time, as to one-third of its risks, the United was, in every practical sense, re-insured. Article 1 of the agreement expressly defines the liability of the Munich in the following language:

> "It being understood that the *liability* assumed by the Munich shall be one-half (½) of the *liability* retained

by the United for its own account in each and every case." (Italics ours.) (R. 14 and 15.)

Second: The Contract was for a term of five years from January 2, 1906, with automatic renewals for like terms "unless written notice of a desire to terminate the same be given by registered letter from either party one year previous to the expiration of any term of five years" (R. 19). The Munich, however, reserved the right to terminate, on notice, during any term after the first "if the transactions under this Agreement result in a loss of the "Munich" (R. 19). Forms were provided for the annual accountings; and due provision was made for a final accounting and settlement within two years after termination. This was necessary, because the annual accountings were subject to revision for the reasons hereinafter shown.

Third: The Munich repudiated the Contract (wrongfully, as was decided) at the end of 1906,—which was the first year of the term; and the circumstances were these:

A: The United was to have a paid-in capital of five hundred thousand dollars; and a surplus of two hundred and fifty thousand dollars; and the Munich was to take stock to the amount of fifty thousand dollars,—if and when the balance of the authorized capital and surplus had been taken.

B: The first president of the United was something of a promoter; and he undoubtedly misrepresented, both to the Munich and to his fellow-directors, the character of his subscription list. This misrepresentation was discovered by some of the United's directors, who notified the New York representatives of the Munich, and called a meeting of all concerned. This meeting was held in Baltimore on the evening of Saturday, August 25, 1906. The Munich's representatives stated their grievance, namely: that approximately three hundred and fifty thousand dollars of the stock subscriptions were either contingent or were made by persons of doubtful financial strength. It so happened that among the

directors and stockholders of the United were men of standing. They said to the representatives of the Munich: Your Company (and we) have been fooled; but we believe that with the Munich's backing, the United will succeed. We will change the management of the Company; give the Munich representation on the Board, and we will increase our subscriptions to the extent of three hundred and fifty thousand dollars and pay this amount into the Company in cash on Monday next:—ALL PROVIDED THAT THE MUNICH WILL RATIFY ITS SUBSCRIPTIONS AND CONTRACT. The Munich representatives agreed; and what was promised on behalf of the United,—was duly performed. All of which appears in the Opinion of the Court of Appeals of Maryland in the case of the *Munich Company vs. United Surety Company*, 113 Md. 200,—said opinion being by stipulation made part of the Record. (R. 6, 43, 86, 192.)

C: In the fall of 1906, Mr. Schreiner, who was the foreign manager of the Munich, and who had been in Germany during the preceding summer,—returned to this country. For some reason or other, he was dissatisfied with the situation he found; and, on the first day of November, 1906, the Munich gave notice to the United rescinding the Contract (113 Md. 203; 225-6).

Fourth: It is somewhat important to grasp clearly the subsequent proceedings in the order of time (R. 117).

A: In May, 1907, the United brought suit at law against the Munich for the first year's accounting under the Contract; and later in the same month, the Munich filed a Bill in equity to enjoin this suit; and to have the Contract declared null and void on the ground that its execution had been induced through false and fraudulent misrepresentation. Strangely enough, the Bill admitted that the Munich had ratified its subscription at the meeting in August, 1906; but averred that the ratification did not include the Contract. To this Bill, the United filed its Answer, setting up ratifica-

tion, with full knowledge of all the facts; and by way of cross-relief, asked for an accounting under the Contract.

B: The Court dismissed the Munich's Bill; but retained the Cross-Bill for an accounting; and its action was affirmed by the Court of Appeals on May 6, 1910 (113 Md. at 202,—ABOUT SEVEN MONTHS BEFORE THE CONTRACT EXPIRED. During all of the intervening time the Munich had maintained the position that there was *no* contract between it and the United; but in December, 1909 (and before the decision of the Court of Appeals) it gave formal notice of its withdrawal under Article 12 of the Contract (R. 19), and one result of the Munich's repudiation was that the United, in its reports to the various State Insurance Commissioners, could not treat the Munich's liability as an asset.

C: On the nineteenth day of November, 1910, the parties entered into an agreement (R. 118-120) to facilitate the accounting ordered by the Circuit Court and affirmed by the Court of Appeals; on the succeeding eleventh day of January, 1911, the United went into the hands of receivers; and the Agreement of November 19th was carried on by them. After intervening proceedings unnecessary now to relate, the Circuit Court on January 2, 1913, ratified an Audit as of December 31st, 1910, awarding the receivers approximately $154,000; and on June 26, 1913, this decree was reversed in part by the Court of Appeals (*Munich Co. v. United Surety Co.*, 121 Md. 479) for the reason, principally, that the award included items of liability not then definitely ascertained (121 Md. at 493; R. 152-4). But the Court said:

> "The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the Agreement" (121 Md. at 496, end; R. p. 157, end).

D: After remand, there was a new audit giving the receivers approximately $77,000. This was ratified without objection; and the report of the auditor stated:

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D: After remand, there was a new audit giving the receivers approximately $77,000. This was ratified without objection; and the report of the auditor stated:

> "In accordance with the Opinion of the Court of Appeals of Maryland, this Account does not affect the amount properly payable by one contracting party to the other for the final period" (R. 158).

The Munich paid on October 2, 1913, and the receipt of the receivers, "under and in accordance with the Auditor's Report and Account," appears on page 165 of the Record.

E: On June 5, 1914, the receivers filed their petition for a final accounting (R. 120). The Munich resisted. It admitted that the final accounting provided for in the last paragraph of Article 13 of the Contract (R. 20) was yet to come; but it said that the Court was without jurisdiction in the pending case, because the decree therein only covered the *annual* accountings; and had been satisfied. The Circuit Court so held; and therein was affirmed by the Court of Appeals on June 24, 1915 (*Munich Co. v. Poe*, 126 Md. 520; R. 122). It was held that the final accounting would require new proceedings (126 Md. at 534), because in the former litigation:

> "The Court only had before it for review, the accounting for the five annual periods ending January 1, 1911. The audit before the Court did not include an accounting for a period after that time, and the Court did not pass on a settlement for any such period" (126 Md. at 527; R. 127).

Fifth: Thus the Munich escaped from a final accounting in the State Court. It had no agent in Maryland, and before proceedings elsewhere could be made effective, the War ensued and extended litigation followed between the Alien Property Custodian and the Trustees of the Munich, who resisted the sequestration of its property. The present suit was brought against the Alien Property Custodian after the property of the Munich was transferred and assigned to him.

No question affecting the Custodian, as such, is raised by the Appeal.

Sixth: In concluding this Outline of Facts, it will be helpful to clarify certain accounting provisions of the Contract.

A: The annual accounts were not, and could not, be final. Under the well recognized practice embodied in the laws of most of the States, so-called reserves are set up as liabilities in insurance accounting; and these are of two kinds. In the first place, there is the premium reserve for unexpired risks. Manifestly, since the premium is charged in advance, and is carried on the books as an asset, it becomes necessary to treat the unearned amount of this premium as a liability, in order to show the real result of the year's operations. At the close of the succeeding year, some or all of the unearned premiums (depending on the life of the bond) will become earned. To this extent, the liability of the former year will become an asset of the succeeding year and there will be a new premium reserve set up as a liability. Consequently, the premium reserve is listed as an item of disbursement in the United's annual accounts with the Munich (R. 17-18); and in each succeeding year, the past liability is credited as a receipt, in order to cover into the treasury so much as may have been fully earned. In the second place, there is a reserve for unadjusted claims,—an entirely different charge. A surety company does not pay all losses immediately on the happening of a default; but when a claim is made, there is a potential liability which must be included in any true statement of the business. Accordingly, an estimate is made of the probable loss and expense of adjustment; and the aggregate of such estimates constitutes the "claim reserve." Like the premium reserve, the claim reserve was to be charged as a disbursement in the United's annual account with the Munich (R. 17-18); and in the succeeding year credited as a receipt,—because all items in the prior claim

reserve would appear in the succeeding statement as items of losses paid or in a new claim reserve. And so with the item of "gross premiums." These were possible income only when charged on the books, because subject to actual collection or subsequent return, in case of cancellation. Manifestly, these annual statements were tentative and settlements based on them could not be final. Therefore, it was provided that within two years after the expiration of the Contract, accounts were to be made up showing the actual results of the *whole* business (Art. 13, R. 20). Inasmuch as the "premium reserve" only represents *unearned* premiums; and premiums on business written more than a year prior to this final accounting would then be fully earned,—this final account was not chargeable with the "premium reserve" (Contract, Art. 13). It would, however, show all the other items set forth in Article 8 (R. 17-18). If all claims pending on business written during the term of the Contract had not been adjusted, the "claim reserve" would still be maintained in the account; but as the actual losses might ultimately exceed or be less than the estimate,—the Contract further provided (Art. 13) that "after the final settlement of each of such claims, the Munich will be paid any difference in its favor and pay any difference in favor of the United."

THE CONCLUSIONS OF THE COURT BELOW.

By various stipulations in the District Court the parties agreed as to figures; and left open for discussion only the principles involved. There was argument on the main questions, namely: Whether there should be *any* accounting; and if so: Whether the Munich's obligation attached until the United's policyholders had been *actually paid*. Judge Rose disposed of these questions in a careful Opinion (R. 166). Next (again after argument) came a decree referring the

cause to a Special Master,—with instructions to be followed in stating the account (R. 172). The Master's Report was duly filed; and the Munich's exceptions thereto (R. 185) were argued. The learned Judge (as he said—R. 188) examined the evidence taken before the Master; and in another Opinion (R. 187) confirmed his Report. Thereupon came the final decree (R. 189), which was affirmed by the Circuit Court of Appeals.

THE MUNICH'S CONTENTIONS.

There are numerous assignments of error, but all of them have been reduced by the Appellant (Brief 7-8) to three propositions,—thereby eliminating from consideration much of the Record.

MUNICH'S FIRST CONTENTION: The Munich says that the receivers are barred from *any* recovery because there was an implied term in the Contract, namely: that the United would be successful; and that having disabled itself from carrying on business by going into the hands of receivers, it broke the Contract and cannot recover thereon. For this proposition the principle of "anticipatory breach" applied in *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581-91, is relied on. As Judge Rose shows (R. 169-70), the case is irrelevant. It decides that a Hotel Company has a provable claim in bankruptcy against a corporation which had contracted to furnish livery, drayage, etc., to the hotel and its patrons, which contract at the time of the bankruptcy of the Service Company had yet two years to run. The Trustee in Bankruptcy refused to assume and carry on the contract (pp. 587 and 590) and the Hotel Company was obliged to procure the service elsewhere for the unexpired term at increased cost, for which it was allowed a claim in bankruptcy.

The contract, in so far as the questions discussed are concerned, was executory (p. 589), and no question of the rights of the parties to adjust accounts for business done before the bankruptcy was involved. It was conceded that the Trustee might have assumed and carried out the contract (p. 590).

In the present case the Munich had given notice of termination of the relationship and the period of notice expired before the receivership, so that the right to bind the Munich on new business had expired, and nothing remained but to determine the rights of the parties as to risks already assumed; in other words, a liquidation of the business and an accounting under the agreement; a situation in direct contrast to the executory contract treated in the Auditorium case.

Moreover,

A: The Munich is not in a position to rely upon any such defense.

All of the accounting procedure and litigation in the State Courts took place *after* the receivers were appointed. The Munich uniformly admitted its liability to a final accounting, such as is being asked for here, and the Maryland Court of Appeals, in Munich Re-Insurance Company vs. United Surety Company and Receivers of the United Surety Company (121 Md. 479, 496), in which it reversed the decision of the lower Court on the Munich's appeal, concluded its opinion with the following statement:

> "The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the agreement." (R. 157.)

This was in June, 1913, two and a half years after the receivers were appointed. And in the later case (126 Md. 531), in which the Munich successfully objected to the jurisdiction of the Maryland Court to compel a further accounting under the decree that had been entered in that case

(R. 121), the same concession (that a final accounting was to come), is repeated (R. 122 and 131, top). It is this final accounting that the Munich is attempting now to entirely defeat by this defense. Clearly this defense is an afterthought and not available even if under any conditions sufficient. It is difficult to see the force of the Munich's contention to the contrary. (Brief, p. 20.)

B: Again: the very object of the Contract was to protect the United's stockholders against one-third of the losses if the venture *should* prove *unsuccessful*. Why else should the Munich receive one-third of the profits in case of success? The Contract provided for the *Munich's* right to retire, after the first term (R. 19) "if the transactions under this Agreement result in a loss" to it. But the Court is now asked to write in *another* provision, namely: that if in any year, the losses prove so great as to impair the capital and thereby stop the business,—then the Munich may walk away with previous profits, if any, and leave the United without any claim on it. An umbrella for fair weather only.

C: Least of all can such contention come from the Munich. Wrongfully (as the Court of Appeals decided) it repudiated the Contract in the first year of the five-year term, and maintained this attitude until a few months before the receivers were appointed. Never, during the contract period, did the Munich pay a dollar of its contract liability to the United. A different course, as the witness Clark said (R. 55), would have prevented any receivership; and there is force in his statement (R. 56) that if the Munich had admitted its liability for its one-third of the losses, there would have been no insolvency from the insurance point of view. *Certainly, a "joint adventurer"* (Appellants' Brief, p. 27) *whose wrongful desertion cripples the ship can hardly complain of the lost voyage. Nor can the doctrine of "anticipatory breach" be invoked by one who wrongfully repudiates during the other party's performance.*

D: Much the same confusion appears in the stress put by the Munich's learned counsel on the fact that when the receivers were appointed, and for some time afterwards, the United claimed to be solvent; and was so treated by the State courts. The argument apparently is: that since the United was solvent, the receivership was a wrong to the Munich. In the first place, it must be remembered that the test of solvency under the Maryland law (differing herein from the test in bankruptcy) is the ability to pay your debts in the ordinary course of business; and this explains the United's successful opposition to the Bill of Preston (R. 86). In the second place (as Judge Rose says—R. 170), when a surety company, however solvent, stops doing new business because of impaired capital, it must either reinsure or go from bad to worse. Certainly, as the sequel showed, the Court of Appeals made a mistake in reversing the Order of Judge Heuisler (R. 69, 120 Md. 91), under which the receivership would have terminated years ago. But *what* difference can it possibly make *in the issue here,* whether the United was or was not technically solvent when the receivers were appointed? It had been stopped from further business by the Insurance Commissioner of its own State (R. 106). The wrongfully repudiated Munich Contract had expired; the United's stockholders stood to lose two dollars for every dollar of loss to the Munich; and as Judge Rose says (R. 170):

> "In that state of things, all that the Munich could justly require was that the United should, in good faith, exercise reasonable care to wind up its business to the best advantage, and that, so far as the Record discloses, is precisely what the receivers did."

Surely this is good sense; and it is also an answer to the Munich's complaint, that there were some seventy millions of business on the United's books when the receivers took

possession; and that if this business had been allowed to run out, the premiums would have become earned and much loss saved. But how was this possible? The best classes of bonds were cancelled by their owners. The Company's agents in the various States; its office and field forces, its adjusters,—were no longer available; the effort of the receivers to cancel the risks was the obviously wise thing for both parties; and it is significant that the Record nowhere shows any protest or objection by the Munich,—until years afterwards and in this case. As the Court of Appeals of Maryland has recently said:

> "There is other evidence tending to show that the receivers, as well as the learned Judge who had charge of the receivership, took active and *proper* (italics supplied) precautions to advise parties interested of what they believed to be the real condition of the United Company, and to show that they were desirous of having it relieved of future liability by thus obtaining new sureties and relieving the United Company"—*Barber Asphalt Co. v. Poe*, 139 Md. at 339.

The Munich's Second Contention: The next proposition of Munich is that (assuming its liability to account) the Court erred in construing the Contract (Brief, p. 23). The argument here is divided into two parts.

I: It is said (Brief, p. 24) that if the Contract is one of re-insurance, then the Munich was entitled to 1/3 of all premiums charged by the United whether collected or not. The discourse here (with respect) seems merely didactic; and is quite irrelevant to the Contract between the parties. The Munich's interest was in the net gains or losses (Article 9: R. 18) based (Article 8: R. 17) on *income* and disbursements.

II: It is contended, however, that the Contract is *not* a *re-insurance* contract; and *therefore* the Munich's obligation arises only when (and is limited by what) the United pays to its creditors; and (it is argued) "since none of the claims against the United which form the basis of the accounting herein have been paid, the judgment and decree of the Court below should be reversed and the Bill ordered dismissed and prematurely brought" (Brief, p. 30). In view of this statement and that on appellant's brief, page 16, it is well to state that in addition to the $57,000 (R. 77) paid to creditors prior to the hearing, all preference claims against the receivership, amounting to approximately $70,000, have been paid and a general distribution to creditors of twenty per cent. has been made. CONCERNING THIS CONTENTION OF THE MUNICH IT IS SUBMITTED FURTHER:

A: The second position, namely: that the Contract is *not* a re-insurance contract, was adopted, necessarily, to take the case out of the decisions in *Allemannia Fire Ins. Co. v. Firemen's Ins. Co.*, 209 U. S. 326, 332; and *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59, 74. These cases settle the point that where the contract contains the element of indemnity, the liability of the re-insurer "is not affected by the insolvency of the insured or by its inability to fulfil its own contract with the original insured." In the Contract at bar, of course, the element of indemnity is distinctly present; and the practical difference between it and a conventional re-insurance is, that the Munich took its pay, not in the shape of a premium, but through a participation in profits and losses.

The question, however, is not one of labels. The obvious intent of the contract at bar was that precisely noted by this Court in the *Allemannia case* (209 U. S. at 334): "The original company may have re-insured for the purpose for which re-insurance is usually, if not universally, accomplished,—for the purpose of supplying itself with a fund with

which to meet its obligations." And the same case shows that even where the reinsurer's contract is to pay "at the same time and pro rata with the insured," "such language simply gives to the Company the benefit of any defense, deduction or equity which the first insurer may have, making the liability of the re-insurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay" (209 U. S. at 333).

B: The principles above announced are (we submit) plainly applicable to the contract here involved; and whether you call it one of re-insurance or of participation is of little moment. The fallacy of the appellant's learned counsel lies in confusing the modal and administrative provisions for the periodic settlements (which are necessarily stated in terms of the United's receipts and *payments*) with the Munich's ultimate liability. The Munich does *not* agree to pay the United one-third of any dividend that its creditors may have received in liquidation out of the United's estate if the joint venture fails. It *does* agree (whether the United succeeds or fails) to pay one-third of the *losses* resulting from the joint venture. The United cedes and it accepts "one-third share of the amount insured under every bond policy or guarantee" of the classes named; the Munich "assumes" one-half of the United's "liability" "in each and every case" (Art. 1, R. 14) on all of the joint business. The Munich's "liability" coincides with the United's (Art. 2; R. 15) throughout its whole extent. If the Munich exercises its right of withdrawal, it remains "liable" for losses growing out of unfinished business (Art. 12; R. 19). Surely in vain do the Munich's learned counsel attempt to convert a *liability* for *losses* incurred under the insurance policies into an obligation measured by the United's solvency.

C: Furthermore, the Munich's contention lacks both fairness and plausibility. As Judge Rose said (R. 170-71):

> "The Munich was to pay one-half of the net liability retained by the United. There was no limitation as to

the amount for which it might become bound. When the contract was made, it was quite possible that the obligations which in five years the United might assume, would ultimately entail a liability exceeding its capital and surplus. In that event, it would have to close its doors and liquidate its business, and if it did, according to the Munich's present contention, the latter would be discharged, that is to say, if the United's losses were very great, the Munich would be released from obligation to pay any of them. Such a claim is its own best answer."

If (for illustration) the stockholders of the United were under a statutory extra-liability to its creditors, and if some catastrophe had wiped out its assets, then, under the Munich's contention, it would go scot-free, leaving the United's stockholders to bear the whole burden.

THE MUNICH'S THIRD CONTENTION.

Finally, the Munich says that even if (1) the doctrine of anticipatory breach, as applied in the Auditorium case (Brief p. 16) is not applicable here; and even if (2) it is *now* bound to contribute one-third of the ascertained losses growing out of the joint business,—regardless of the United's insolvency;—nevertheless the decree is excessive by one-third of $125,000, or approximately $42,000 (Brief 31, 34). Here again (it is with respect submitted) the learned counsel are confusing words and things.

A: The five years of the contract began with 1906 and expired with 1910. The decision holding the Munich's repudiation of November 1, 1906, wrongful, was not rendered until May, 1910 (113 Md. 202). The Receivers were appointed in February, 1911. In the interval between the decision and the appointment of the Receivers, namely: in November, 1910, the Munich and the United entered into an accounting agreement (R. 118) whereby the American Audit Company

was to state (from the books of the United) "an account in annual periods beginning January 2, 1906, and ending on January 1, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company as per their contract above referred to" (R. 118). The Agreement further provided (R. 119) that "the audit shall not extend to outstanding liabilities for unexpired risks or claims not yet settled; both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for future adjustment between the parties under the terms of the contract." The United's Receivers and the Munich's co-operated in this audit; and it was the basis of the money decree affirmed in part and reversed in part by the Court of Appeals (121 Md. 479; R. 142) in June, 1913.

B: The audit which was before the Court of Appeals (R. 146, top) necessarily showed under Income for 1910, the gross premiums *booked* during the year (R. 17); and obviously, there must have been on December 31, 1910, some premiums treated as income which subsequently proved uncollectible. All of them, moreover, were subject to return by the United (as to the unearned portion) if in the ensuing year either party cancelled the policy. Of course, during the running of the contract, this made no difference, because while the *annual* settlement was on the basis of gross premiums as *charged*, those subsequently returned were allowed as a disbursement in the next year's statement (R. 17).

C: In the audit for 1910, therefore, the Munich was credited with the gross premiums on joint business as charged on the United's books (and whether collected or not), namely, about $454,000 (R. 150). But subsequently, the Receivers (because of cancellations or inability to collect) wrote off approximately $167,000 of premiums appearing as assets; and about 75% of this amount (Brief, p. 34) or $125,000 was part of the $454,000 appearing as Income in the 1910 audit. The Munich (Brief, 34-35) does not, in this connection, ques-

tion the "propriety" of this action by the Receivers; but it says that the tentative credit of $454,000 as gross premiums in the 1910 audit may not now be reduced to the actual figures,—because certain expressions of the Maryland Court of Appeals make the question *res judicata* (Brief, 43).

D: The answer lies in the fact that Judge Urner, who delivered the Opinion in 121 Md. 479 (R. 142), fell into the error of assuming that the Account before the Court was the *final* account provided for by the contract. It was overlooked that, although the date of the audit was more than two years after the expiration of the contract, the actual figures were, nevertheless, *as of* December 31, 1910,—the expiration date. It was said (R. 149) "the present accounting must accordingly include the annual ascertainments of profit and loss required to be made during the currency of the contract *and also the settlement for which it provides after the expiration of the notice of withdrawal*" (Italics supplied.)

E: The error was corrected in the later case reported in 126 Md. (R. 121) which discharged the Munich from the proceeding in the State Court. It was there said (R. 127): (a) that the Court in the earlier case did not mean the settlement "to include the two years after 1910"; (b) that in the earlier case "The Court only had before it for review the accounting for the five annual periods ending January 1, 1911. The audit before the Court did not include an accounting for a period after that time, and the Court did not pass on a settlement for any such period." And (c) that there *only* were three questions disposed of by the auditor's report before the Court in the earlier case. NONE OF THE THREE (R. 128, top) INVOLVED THE RIGHT OF THE UNITED, IN THE FINAL ACCOUNTING, TO REDUCE TO ACTUAL FIGURES THE TENTATIVE CREDIT ALLOWED FOR GROSS PREMIUMS IN THE AUDIT FOR 1910. Nor was this question raised or discussed in any Opinion.

F: The Munich's learned counsel (Brief, 42) furthermore abstracts from the Opinion in the later case one expression, namely (R. 133): "the only items left open after the decision in 121 Md., are the reserve for claims and the ultimate liability of the Munich Company with respect to obligations issued by the United Company which were covered by the Participation Agreement 'as to which the defaults are not now but may hereafter be disclosed' to use the language of that Opinion." But when Judge Boyd was speaking of the "only items left open," by Judge Urner's decision, he was obviously thinking of the questions raised in the earlier case, and with which Judge Urner had dealt. There was no discernible reason why the tentative "gross premiums" item should have been treated as final; nobody so thought or contended; and it seems strange to invoke the doctrine of *res judicata* for a question not in issue or under discussion; and which arose from events occurring after the date of the audit which was before the Court. Judge Rose deals with this question in his Second Opinion (R. 188); and (it is believed) unanswerably.

The Decree should be affirmed.

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